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IN THE  
**Supreme Court of the United States**

OCTOBER TERM, 1988

TYRONE VICTOR HARDIN,

*Petitioner,*

v.

DENNIS STRAUB,

*Respondent.*

On Writ of Certiorari To The United States Court Of Appeals  
For The Sixth Circuit

**REPLY BRIEF**

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## ARGUMENT

### I. INTRODUCTION

This Court has repeatedly used a three-step test to determine the statute of limitations applicable to a claim filed under 42 USC § 1983:

First, courts are to look to the laws of the United States “so far as such laws are suitable to carry [the civil rights statutes] into effect . . . .” If no suitable federal rule exists, courts undertake the second step by considering application of state “common law, as modified and changed by the constitution and statutes” of the forum state. *Ibid.* A third step asserts the predominance of the federal interest: courts are to apply state law only if it is not “inconsistent with the Constitution and laws of the United States.” *Ibid.* *Burnett v. Grattan*, 468 U.S. 42 (1984).

*Wilson v. Garcia*, 471 US 261, 271 (1985). Under 42 USC § 1988, courts are directed to apply state limitations rules unless those rules conflict with the federal policies embodied in 42 USC § 1983. The state limitations rules “borrowed” for application to § 1983 actions “logically include[] rules of tolling” since “any period of limitation . . . is understood fully only in the context of the various circumstances that suspend it from running against a particular cause of action.” *Board of Regents v. Tomanio*, 446 US 478, 485 (1980), quoting *Johnson v. Railway Express Agency, Inc.*, 421 US 454, 463 (1976). Accord, *Chardon v. Fumero Soto*, 462 US 650 (1983).

The issue in this case is whether the Michigan disability tolling statute, M.C.L. 600.5851(1), is inconsistent with the federal policies embodied in 42 USC § 1983 such that federal courts must reject the application of the state statute to § 1983 actions.<sup>1</sup>

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<sup>1</sup> There is no dispute that Michigan courts would apply the tolling

## II. RESPONDENT FAILS TO IDENTIFY ANY CONFLICT BETWEEN M.C.L. 600.5851 AND THE PARAMOUNT GOALS OF § 1983.

This Court has clearly stated that the paramount policies behind § 1983 are two: to compensate those wronged, and to deter the wrongdoers. See *Robertson v. Wegmann*, 436 US 584 (1978). Therefore, unless a state statute of limitations, with its coordinate tolling provisions, impairs either of these two policies, the state statute ought to control.

### A. The Michigan Tolling Provision Fosters The Federal Interest Of Compensation.

Respondent does not argue that M.C.L. 600.5851 is inconsistent with “the central objective of the Reconstruction Era civil rights statutes . . . to ensure that those individuals whose federal . . . rights are abrogated may receive damages or injunctive relief.” *Felder v. Casey*, 487 US \_\_\_, 108 S.Ct. 2302, 2307 (1988), quoting *Burnett, supra*, at 55. In fact, respondent describes the Michigan statute as “neutral with regard to the issue of compensation.” See Respondent’s Brief at pp. 20-21.

Given the compensatory purpose of the civil rights acts, *any* state statute of limitations will to some degree undercut the federal policy (of compensation). As noted in *Burnett v. Grattan*:

The [civil rights acts] are characterized by broadly inclusive language. They do not limit who may bring

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statute in petitioner’s favor on a state claim. *Higley v. Mich. Dept. of Corrections*, 835 F.2d 623, 625 (CA 6, 1987), citing *Hawkins v. Justin*, 109 Mich. App. 743 (1981). The *Higley* court notes that the Michigan legislature has reviewed the statute as recently as 1986. *Id.* See also Respondent’s Brief at pp. 12-13.

suit, do not limit the cause of action to a circumscribed set of facts, nor do they preclude money damages or injunctive relief. An appropriate limitations period must be responsive to these characteristics of litigation under the federal statutes. A state law is not “appropriate” if it fails to take into account practicalities that are involved in litigating federal civil rights claims and policies that are analogous to the goals of the Civil Rights Acts.

468 US at 50.

In one sense all statutes of limitations are inconsistent with § 1983 because the state and federal laws work at cross-purposes. The policies that underlie statutes of limitations further the *state* goal of repose—the notion that stale claims ought not to be brought with ease, or that unreasonable delay ought not to be rewarded. Since § 1983 is a broad remedial statute that creates a remedy for the most egregious kind of official misconduct, any state-imposed filing deadline will undermine the compensatory policy of the federal law to some degree. *Burnett, supra*, at 54-55. Contrary to what respondent argues, tolling provisions are not “neutral”—by creating exceptions to state filing deadlines, they *advance* the compensatory purpose of the federal law.

**B. The Michigan Tolling Provision Fosters The Federal Interest Of Deterrence.**

The heart of respondent’s argument is that Michigan’s tolling statute is “inconsistent with the deterrent objective” of § 1983. See Respondent’s Brief at pp. 18-20. Surprisingly, respondent devotes fewer than three pages to this central issue.

Respondent, without additional discussion, relies on *Higley v. Michigan Department of Corrections*, 835 F.2d 623 (CA 6, 1987), and *Vargas v. Jago*, 636 F.Supp. 425 (SD

Ohio 1986) for the surprising proposition that shorter limitations periods are a stronger deterrent. With all due respect to the district court in *Vargas*, its analysis, which is the source of the respondent's argument, stands logic on its head.<sup>2</sup> It seems obvious to petitioner that the *longer* the statute of limitations the greater the deterrent value. Presumably state officials will be more hesitant to engage in conduct that violates others' civil rights if the victims have more time to sue, thus increasing the officials' exposure to liability. Indeed, the policy of deterrence would be served best if there were no period of limitations at all. See Petitioner's Brief at 21-25.<sup>3</sup>

Deterrence is mentioned most often in the criminal context, where prevention of anti-social behavior is a paramount goal. We impose stiffer penalties for more serious crimes as a deterrent.<sup>4</sup> Our criminal justice system also has lengthy limitations periods precisely so that persons who contemplate breaking the law, or suspects who flee

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<sup>2</sup> *Vargas* introduces the bizarre idea that a prisoner's filing of a § 1983 action serves a "rehabilitative" function in the prison setting, concluding that inmates should have to sue quickly in order to profit behaviorally from their victory. See 636 F.Supp. at 429. *Higley* borrows this muddled theory and applies it also to the *guards*, suggesting that correctional officers, like pets or infants, must be disciplined quickly (by the filing of a § 1983 action within three years?) in order to learn from their mistakes. See 835 F.2d at 626.

<sup>3</sup> Even on its own terms the respondent's analysis is misleading. In every case there is a greater deterrent value in a delayed yet successful suit (petitioner's position) than in an unsuccessful suit in which a serious civil rights violation goes unremedied (respondent's position). The appropriate comparison is not between the deterrent effects of promptly filed versus late filed claims (as *Higley* and respondent suggest) but between late filed claims where relief is granted versus late filed claims where relief is denied as time-barred.

<sup>4</sup> See generally, Andenaes, *Punishment and Deterrence* (1974).

prosecution, will have to fear prosecution (or will be subject to punishment) for the longest permissible time.<sup>5</sup> The Sixth Circuit's odd adherence to the opposite principle has been rejected by the other circuits for good reason, and *Higley* deserves to be overruled.

### III. THE OTHER "FEDERAL INTERESTS" IDENTIFIED BY THE RESPONDENT ARE CONSISTENT WITH THE MICHIGAN DISABILITY TOLLING PROVISIONS.

In addition to discussing the purposes of § 1983—compensation and deterrence—respondent also looks at "other federal interests which must be considered in determining whether to borrow a state tolling statute." Respondent's Brief at pp. 22-27. These interests include "uniformity, certainty, minimization of unnecessary litigation, and federalism." *Id.* at 22.<sup>6</sup>

Despite what the respondent claims, these "interests" are not policies embodied in § 1983. They are judicial concerns which have been addressed by the Court in order to promote the primary purpose of § 1983, namely the enforcement of civil rights. In making these "other

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<sup>5</sup> In Michigan, for example, murder prosecutions are not subject to any limitation period. Kidnapping, assault with intent to murder, and extortion are subject to a ten year statute of limitations. The residual criminal statute of limitations in Michigan is six years. These limitations periods are tolled during any time that the party charged is not a resident of Michigan. See MCLA 767.24. Tolling provisions are also incorporated into the statute of limitations of the Modern Penal Code. See *Model Penal Code and Commentaries (Official Draft and Revised Comments)*, Part I, Article I, § 1.06 (American Law Institute 1985).

<sup>6</sup> Citing *Tomanio*, *supra*, at 492, respondent concedes that the policy of federalism would be advanced by a reversal in this case. See Respondent's Brief at pp. 25-26. Petitioner agrees, and therefore will not address that "interest" separately.

interests" arguments, respondent uses language from *Wilson v. Garcia*, *supra*, but substitutes a new meaning for each of the Court's terms.

**A. Interstate And Intrastate "Uniformity And Certainty" Are Not Impaired By Tolling.**

Respondent first argues that "uniformity and certainty" demand that claims may not be "barred in one state . . . and allow[ed] . . . to remain viable in other states." Respondent's Brief at 23. The fact that different states apply different statutes of limitations to identical claims has been settled law for decades. *O'Sullivan v. Felix*, 233 US 318 (1914). In *Robertson v. Wegmann*, 436 US 584, 589 (1978), this Court said that § 1988 "obviously means that there will not be nationwide uniformity" of limitations periods.

The *interstate* uniformity urged by the respondent could only be achieved by an amendment to § 1988. See *Note: A Statute of Limitations for 42 USC § 1983: More Than "Half a Measure of Uniformity"*, 73 U. Minn. L. Rev. 85 (October, 1988). Absent such an amendment to the federal law, the theory of federalism, the practicalities of concurrent jurisdiction, and the doctrine of *Erie v. Tompkins*, 304 US 64 (1938), all suggest that a healthy interstate *diversity* of procedure—and not uniformity—promotes federal interests.

Respondent next argues that uniformity and certainty demand that claims accruing at the same time in the same state not "be subject to a different time period for filing depending on the length of the [disability]." Respondent's Brief at 24. This argument ignores the whole purpose of a disability tolling statute. In passing the tolling statute the Michigan legislature *intended* to extend the limitations period for certain claimants. See *Hawkins v. Justin*,

*supra*, at 747-8. In *Chardon v. Fumero Soto*, *supra*, at 657, this Court explicitly rejected “the argument that the federal interest in uniformity justifie[s] displacement of state tolling rules.”

Even without tolling provisions, statutes of limitations do not lead to perfect *intrastate* uniformity or certainty because the bar of the statute of limitations is not absolute. At common law, as adopted by most states’ rules of procedure, the statute of limitations is an affirmative defense that must be raised by the defendant. Ordinarily failure to raise the defense *in the first responsive pleading* constitutes a waiver of the defense. See e.g., Michigan Court Rule 2.116(C)(7) and (D)(2). In some situations the statute of limitations can be changed by the parties’ own conduct, extending a claim long after the original cause of action arose, or reviving the claim even after it would have been barred. For example, fraudulent concealment can toll the statute indefinitely, and in contract actions partial payment can re-acknowledge the debt and renew the period of limitations. See M.C.L. 600.5855 and 5866.

As long as state procedural laws are borrowed by the federal courts there will be some inconsistencies in the filing deadlines for civil rights actions among the fifty states. As long as states’ statutes of limitation contain tolling provisions there will also be some inconsistencies in the filing deadlines for civil rights actions within a state. Neither of these deeply rooted practices is contrary to the federal policies of compensation and deterrence embodied in 42 USC § 1983.

**B. “Uniformity And Certainty” Do Not Require A Fixed Period Of Time.**

Next respondent argues that “uniformity and certainty” demand that “a fixed period of time needs to be

readily ascertainable by [the parties]." See Respondent's Brief at 24. When the *Wilson v. Garcia* Court used the term "certainty" it referred to "certainty of the applicable statute of limitations," and not to "a fixed period of time." 471 US at 275. Until *Wilson*, the lower courts had themselves been uncertain which of several state statutes of limitations should apply to § 1983 actions. As a result, the issue (of which statute to apply) was being litigated in almost every case:

... the legislative purpose to create an effective remedy for the enforcement of federal civil rights is obstructed by *uncertainty in the applicable statute of limitations*, for scarce resources must be dissipated by useless litigation on collateral matters.

*Id.* at 275 (emphasis added). In *Wilson* the Court sought to end this "conflict, confusion and uncertainty," *id.* at 266, by directing the courts to borrow and to apply to *all* § 1983 claims the one most analogous state statute of limitations.

*Wilson* did not completely solve the problem, however, and so just this term the Court heard and decided *Owens v. Okure*, \_\_\_ US \_\_\_, 57 U.S.L.W. 4065 (January 10, 1989). *Owens* ruled that every state's "one general or residual statute of limitations governing personal injury actions" will apply to § 1983 claims. *Id.* at 4068. As the unanimous *Owens* Court held:

Potential § 1983 plaintiffs and defendants therefore can readily ascertain, with little risk of confusion or unpredictability, the applicable limitations period in advance of filing a § 1983 action.

*Id.* at 4069. No longer will litigants have to fight over which of several statutes of limitations governs, nor will case by case determinations (of the most appropriate statute) clog the courts. Whether or not a claim is timely

should usually be apparent as of the date of filing. In short, the problem of “certainty” raised by the respondent has already been resolved.

If the respondent’s argument were to prevail, then the problem just resolved by *Owens v. Okure* would re-appear in a slightly altered form. Federal courts borrowing a state’s residual statute of limitations, without the attendant tolling provisions, would have to devise a whole new series of rules about when and how tolling ought to be permitted, and a case by case determination would again be required for every “late” claim. By requiring that tolling provisions be borrowed as integral components of any state statute of limitations, certainty about the applicable law is achieved. See *Board of Regents v. Tomanio*, 446 US at 485-86, and *Chardon v. Fumero Soto*, 462 US at 657. See also Petitioner’s Brief at 11-16.

Even using the term “certainty” in the way respondent uses it, the respondent’s argument is still unconvincing. In fact the Michigan tolling statute does provide a measure of “certainty” for the litigants. It instructs the parties that one year from an objectively ascertainable date—the prisoner’s date of release—the claim will be barred. While it may be true that all tolling reduces “certainty” in some psychological sense, that quality is not unique to the Michigan law. (All exceptions to rules create “uncertainty,” usually in the interest of fairness.) Respondent fails to state how tolling of the statute of limitations runs counter to a *state* policy (when the state legislature itself enacted the tolling provision in the first place), or how it contravenes a *federal* policy (when the primary federal policies at issue are compensation and deterrence).

### C. Tolling Does Not Create “Unnecessary Litigation.”

Finally, respondent argues that tolling § 1983 actions is inconsistent with “the federal interest in reducing unnec-

essary litigation." Respondent's Brief at 25. When the term "unnecessary litigation" is used in respondent's brief, it refers to the merits of inmates' § 1983 actions. However, when the Court used those words in *Wilson v. Garcia*, 475 US at 275, it was not referring to substantive § 1983 claims, but to the "unproductive and ever increasing litigation" on the "collateral issue" of the "applicable statute of limitations." Ibid. By requiring that tolling provisions be borrowed as integral components of any state statute of limitations, this Court has sought to avoid "unnecessary litigation," and has consistently rejected what the respondent proposes here.

**D. No U.S. Supreme Court Authority Supports The Respondent's Arguments.**

This Court has addressed issues relating to limitations of § 1983 actions in several cases in recent years. In *Tomanio, supra*, and *Fumero Soto, supra*, the Court held that state tolling rules should be applied to § 1983 actions as those rules would be applied by state courts under state law. Respondent never attempts to explain why the Michigan disability tolling statute is different, for § 1983 purposes, from the New York statute applied by the Court in *Tomanio*.<sup>7</sup> Even more surprisingly, respondent's brief neither cites nor discusses *Fumero Soto*.

While respondent's arguments seem to have their genesis in *Wilson v. Garcia*, respondent's brief consistently redefines *Wilson's* terms, such that the logic of *Wilson* must be rejected if respondent's arguments are to prevail.

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<sup>7</sup> New York's tolling statutes are essentially identical to Michigan's. See *Tomanio, supra*, at 486, n. 6. The New York prisoners' tolling statute has previously been upheld as consistent with the purposes of § 1983. See *Ortiz v. LeVallee*, 442 F.2d 912 (CA 2, 1971), and *Kaiser v. Cahn*, 510 F.2d 282 (CA 2, 1974).

Respondent asks the Court to read into § 1983 a requirement of interstate and intrastate time uniformity, while *Wilson* and *Owens* only establish predictable rules for choice of limitations law.

In *Felder v. Casey*, 487 US \_\_\_, 108 S. Ct. 2302 (1988), and *Burnett v. Grattan*, 468 US 42 (1984), the Court refused to apply state laws which impeded ready access to the courts by civil rights claimants. In *Felder*, Wisconsin's notice of claim statute was found to be inconsistent with § 1983 since it would have severely restricted claimants' access to the courts. In *Felder* the Court said:

Sound notions of public administration may support the prompt notice requirement, but those policies necessarily clash with the remedial purposes of the federal civil rights laws.

108 S. Ct. at 2310. In *Burnett v. Grattan*, *supra*, the Court held that Maryland's six month administrative statute of limitations should not govern § 1983 court actions. As Justice Rehnquist noted concurring in *Burnett*, before borrowing a state statute of limitations and applying it to § 1983 claims, a court must ensure that the state statute "afford[s] a reasonable time to the federal claimant." 468 US at 61. To date the Court has not rejected any state statute that made access to the courts easier for persons claiming to be victims of civil rights violations.

#### IV. RESPONDENT IGNORES THE LEGISLATIVE PURPOSE BEHIND TOLLING PROVISIONS.

In arguing that the Michigan tolling statute conflicts with federal civil rights policies, the respondent misstates the statute's scope, purpose, and effect.

##### A. The Michigan Tolling Statute Does Not Apply Solely To Prisoners.

In an attempt to "narrow" the issue before the Court, respondent discusses tolling only in the context of "a

§ 1983 claim of a prisoner against prison personnel which occurred while [the inmate] was imprisoned.” Respondent’s Brief at 13. Respondent fails to address the fact that the Michigan act tolls the statute of limitations not just for prisoners, but for *all* persons “under 18 years of age, insane, or imprisoned at the time the claim accrues.” M.C.L. 600.5851(1). As the Michigan Court of Appeals recognized in *Hawkins v. Justin*, *supra*, at 747-48, the Michigan legislature intended that the extra protection afforded by the tolling provisions apply equally to all three classes of beneficiaries—minors, incompetents, and prisoners.

Nowhere does respondent suggest a logical distinction between tolling for prisoners and tolling for those with other disabilities. Minors and incompetents enjoy the benefits of the tolling provision even though virtually all of them have parents (or guardians appointed by the state) to look out for their interests.<sup>8</sup> These care-providing adults can file suit on behalf of their children or wards,<sup>9</sup> and they certainly have better practical access to the courts and to lawyers than state prisoners have.

Even free, sane, adults enjoy the benefit of tolling in some situations. If the defendant leaves the state, or if the injured party joins the armed forces, then the statute of

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<sup>8</sup> Respondent attacks the statute on the grounds that “the same § 1983 . . . claim would be subject to a different time period for filing depending on the length of the . . . sentence.” Respondent’s Brief at pp. 23-24. But that is true with all tolling statutes, and it is equally true for all classes of disabled litigants. Some minors will have eighteen years to sue, while others will have only a short time. For incompetents, the statute could be tolled forever or for a day.

<sup>9</sup> See e.g., Michigan Court Rule 2.420, and the Michigan Mental Health Code, M.C.L. 330.1600 et seq.

limitations is extended for the duration of these obstacles to the service of process or access to the courts.<sup>10</sup> It is hard to see why all of these state-imposed exceptions—every one of which *increases* access to the courts and *promotes* the federal policies of compensation and deterrence behind § 1983—should be discarded as inconsistent with federal law.

**B. There Is No Factual Support For Respondent's Fact-Based Arguments.**

Apart from the policy-based arguments refuted above, respondent makes two more fact-based arguments in support of the lower court's decision. First, relying on *dicta* in *Hughes v. Sheriff of Fall River County Jail*, 814 F.2d 532 (8th Cir. 1987),<sup>11</sup> respondent raises the spectre of endless litigation, saying that “. . . a prisoner's claim may lay dormant for decades . . . .” Respondent's Brief at 15.

Petitioner notes that neither the facts of this case nor the facts of any of the reported cases involving prisoner tolling statutes support this fear. For example, Mr. Hardin's claim was filed less than two years after the

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<sup>10</sup> See M.C.L. 600.5853, 5854.

<sup>11</sup> Petitioner's principal brief reviews in some detail recent Circuit Court decisions on prison tolling statutes and § 1983 claims, concluding that the Sixth Circuit stands virtually alone in rejecting state tolling statutes on the grounds that they are inconsistent with 42 USC § 1983. Petitioner's Brief at pp. 26-31.

Respondent's brief does not cite any additional authority. Instead, respondent seizes on the *Fall River dicta*, which suggests that the Eighth Circuit, while upholding a South Dakota statute, might not have upheld the Michigan statute. Respondent does not address or explain the rationale of the decisions which hold that tolling statutes are consistent with the policies of § 1983. See, e.g., *Bailey v. Faulkner*, 765 F.2d 102 (CA 7, 1985).

applicable statute of limitations would have run.<sup>12</sup> Assuming that an inmate were to file a claim "decades" late, to the prejudice of the defendant, the doctrine of laches, as well as the court's "discretionary power to locate a just result in light of the circumstances peculiar to the case," see *Occidental Life Ins. Co. v. E.E.O.C.*, 432 US 355, 373 (1977), should permit a court to dispose of such a case without imposing shocking or aberrant results.

Second, respondent resurrects the argument that prison inmates no longer are deprived of access to the courts, and that therefore there is no consuming justification for a prisoner tolling statute. That, of course, is a legislative decision, which the Michigan legislature has decided contrary to the wishes of the state Solicitor General.<sup>13</sup> The respondent's argument also ignores specific

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<sup>12</sup> Respondent does not argue that there are a significant number of tolled § 1983 claims, or that these claims contribute significantly to the docket control problems of the federal courts.

Attached as an Appendix a is a summary of a preliminary study of prisoners' § 1983 actions in the federal district court of the Eastern District of Michigan. Using random sampling, the study looked at 20 percent of all prisoners' actions closed between July 1, 1987, and June 30, 1988. In only 4.6 percent of the cases would the three-year Michigan residual statute of limitations have run but for the tolling provision at issue here.

Of those five files, two were dismissed as *habeas* challenges to the inmates' convictions, one was dismissed as a state tort claim (no action under color of state law), and one involved an ongoing claim for medical care such that the statute of limitations arguably had not run. Only *one case* (less than one percent of the total) was dismissed based on the bar of the statute of limitations.

<sup>13</sup> The Michigan legislature was presumably aware of the *better* access to the courts for minors and incompetents. It nevertheless chose to keep the package of disability tolling provisions intact. See *Hawkins v. Justin*, 109 Mich App. 743, 748 (1981).

findings to the contrary in recent decisions by the federal district courts of Michigan. See *Hadix v. Johnson*, 694 F.Supp. 259 (ED Mich. 1988), and *Knop v. Johnson*, 667 F.Supp. 467 (WD Mich. 1987), and the discussion in Petitioner's Brief at 9-11. Both decisions held that Michigan inmates do not have constitutionally required minimum access to the courts. But even if inmates enjoyed minimal *constitutional* access to the courts, the Michigan legislature has determined that prisoners and other disabled persons are deserving of extra time to perfect their claims, and *that* legislative determination ought to control.

Respondent also cites and relies on the Sixth Circuit case of *Higley v. Mich. Dept. of Corrections*, *supra*. Respondent's Brief at pp. 31-32. The *Higley* panel presumes that prison inmates have access to the courts simply because of the high volume of *cases* they file.<sup>14</sup> This inference is not justified. The raw statistics cited in *Higley*, 835 F.2d at 626, report only the number of *complaints* filed. The data tell us nothing about the inmates' ability to find competent counsel, to identify constitu-

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<sup>14</sup> One of the primary reasons for the outcome in *Higley* seems to have been the panel's concern with docket control:

We are acutely aware of the multitude of cases filed by other Michigan prisoners seeking § 1983 relief in the federal courts. The plethora of § 1983 cases filed indicates very clearly the accessibility of federal courts to prisoners such as Higley.

835 F.2d at 626. While petitioner is sympathetic to the courts' problems with docket control, the *Higley* analysis is seriously flawed. Just because inmate Higley had filed at least two other previous lawsuits during his incarceration, and just because some inmates are virtual litigation machines, it does not follow that all 25,000 Michigan prisoners have meaningful access to the courts. See Appendix A.

tional issues, to draft legally sufficient pleadings, or to respond to motions by the defendants.<sup>15</sup>

In Michigan the form § 1983 complaint used by most prison inmates is printed by the Clerk of the Court and sometimes is furnished by the Department of Corrections. Once the complaint is filed, however, few inmates know how to proceed, and the vast majority of the cases go down on summary judgment. In most of *those* cases the inmate plaintiffs never file any other documents to support their claims or to respond to the defendants' motions for summary judgment or for dismissal.<sup>16</sup>

Petitioner submits that the *legislature's* concern, unlike the Sixth Circuit's, is with *meaningful* access to the courts and to lawyers, and not with docket control.

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<sup>15</sup> In the preliminary study of prisoners Section 1983 files described in the Appendix 'a', inmates were represented by counsel (at any stage of the proceedings) in only 7.4 percent of the cases. Of those eight files, counsel had withdrawn before the conclusion of the action in five of the cases.

<sup>16</sup> Looking at dispositions in the cases summarized in the Appendix 'a', 39.8 percent of the cases were dismissed pursuant to 28 USC § 1915(d), normally before service of process or the filing of an answer. Another 57.4 percent of the cases were decided on summary judgment or Federal Rules of Civil Procedure 12(b)(6) motions. The remaining 2.8 percent of the cases (three files) were dismissed by stipulation or voluntarily, which may or may not indicate settlements.

For more comprehensive studies of prisoners' *pro se* filings in civil rights cases, see T. Eisenberg and S. Schwab, *The Reality of Constitutional Tort Litigation*, 72 Cornell L. Rev. 641 (1987); T. Eisenberg, *Section 1983: Doctrinal Foundations and an Empirical Study*, 67 Cornell L. Rev. 482 (1982); Turner, *When Prisoners Sue: A Study of Prisoner Section 1983 Suits in Federal Courts*, 92 Harv. L. Rev. 610 (1979); and Bailey, *The Realities of Prisoners' Cases Under 42 USC § 1983: A Statistical Study in the Northern District of Illinois*, 6 Loy. U. Chi. L.J. 527 (1975).

The decision as to what constitutes meaningful access to the courts, and therefore the decision about for whom the statute of limitations tolls, is a legislative one that should not be pre-empted by the courts.

Finally, as a matter of legislative policy there is one special reason—unique to prison inmates—why a legislature might want to toll claims (that arise during incarceration) until after the plaintiff is released. Prisons are dangerous places, where felons who are sued by fellow inmates might be more able to retaliate with violence, thus bringing risk to the litigants, and making control of the prison population an even more difficult task than it already is. By allowing aggrieved persons to file suit up to one year after they are freed, the risk of violence between inmates is reduced, management of state facilities is made easier, and fairness is served.

The same rationale applies to and supports the federal purposes regarding § 1983 actions brought by inmates against prison guards acting under color of state law. Correctional staff exercise considerable power over inmates' lives, and it is not unknown for official defendants to harass or to retaliate against inmates who sue. The tolling provision prevents such abuses by allowing inmates to wait to file their claims until they are released from the system, where they are safely out of harm's way.

CONCLUSION

For all of the above reasons, petitioner requests that the decision of the Court of Appeals for the Sixth Circuit be reversed, and that this action be remanded to the district court for trial.

Respectfully submitted,

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